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No. 03-1552

In the Supreme Court of the United States

MAINSTREAM MARKETING SERVICES, INC., ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the nationwide "do-not-call registry" regulations, which establish a database of consumers who do not wish to receive commercial telemarketing calls and which prohibit commercial telemarketers from soliciting via telephone consumers who voluntarily list themselves on this database, violate the First Amendment rights of commercial telemarketers.

2. Whether Federal Trade Commission regulations that establish a fee for commercial access to the nationwide do-not-call registry "to offset the costs of activities and services related to the implementation and enforcement" of the registry violate the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 358 F.3d 1228. The memorandum opinion and order of the district court (Pet. App. 80a-112a) is reported at 283 F. Supp. 2d 1151.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2004. The petition for a writ of certiorari was filed on May 14, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory and Regulatory Background*

Over the past two decades, telemarketing—inducing the purchase of goods or services through telephone solicitation—has become a multi-billion dollar business. It has also become a growing intrusion into everyday life. In the last decade, telemarketers have increased their calls "fivefold," to as many as 104 million calls a day. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14,014, 14,054 para. 66 (2003) (Report and Order). Over the course of that decade, Congress, the Federal Communications Commission (FCC), and the Federal Trade Commission (FTC) have sought to address the problems associated with telemarketing, culminating in the nationwide do-not-call registry that petitioners seek to challenge here.

a. *The Telephone Consumer Protection Act of 1991 and the FCC's implementing regulations*

In the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, § 3(a), 105 Stat. 2395 (47 U.S.C. 227), Congress first attempted to address the "intrusive invasion of privacy" and the "outrage[]" expressed by consumers "over the proliferation of intrusive, nuisance calls to their homes from telemarketers." 47 U.S.C. 227 note. The TCPA directed the FCC to prescribe rules addressing "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. 227(c)(1). In particular, Congress required the FCC to "compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special

directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their costs and other advantages and disadvantages." 47 U.S.C. 227(c)(1)(A). In addition, the TCPA authorized the FCC to "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." 47 U.S.C. 227(c)(3).

The TCPA did not apply to every telemarketing call, only "telephone solicitations"—"the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 U.S.C. 227(a)(3). The TCPA's definition of "telephone solicitations" excludes calls by tax exempt nonprofit organizations, commercial solicitors calling with the consumer's "prior express permission", and any telemarketer with whom the consumer "has an established business relationship." 47 U.S.C. 227(a)(3)(A) and (B).

With respect to the exclusion of tax-exempt nonprofit organizations, Congress concluded that the record before it did "not contain sufficient evidence to demonstrate that calls from [such] organizations should be subject to the [statute's] restrictions." H.R. Rep. No. 317, 102d Cong., 1st Sess. 16 (1991). To the contrary, "[c]omplaint statistics show[ed] that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." *Ibid.* (citing poll conducted by National Association of Consumer Agency Administrators). Congress nonetheless directed the FCC to consider whether it should restrict such telephone solicitations in the future. 47 U.S.C. 227(c)(1)(D).

In 1992, the FCC adopted regulations implementing the TCPA. The primary feature of these regulations was a "company-specific do-not-call" requirement (company-specific requirement), which mandated that commercial telemarketers maintain a list of residential telephone subscribers who request not to be called and that telemarketers honor those requests. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752, 8765-8766 paras. 23-24 (1992); 47 C.F.R. 64.1200(c)(2). The FCC declined to create a nationwide do-not-call registry, in part, because it found that such a database "would be costly and difficult to establish and maintain in a reasonably accurate form" at that time. 7 F.C.C.R. at 8760-8761 paras. 14-15.

b. *The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 and the FTC's implementing regulations*

Three years later, Congress addressed the related problem of "[i]nterstate telemarketing fraud" in the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAPA), 15 U.S.C. 6101(2). The TCFAPA required the FTC to prescribe rules prohibiting "deceptive" or "other abusive" telemarketing practices, 15 U.S.C. 6102(a)(1), such as undertaking "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." 15 U.S.C. 6102(a)(3)(A). Like the TCPA, the TCFAPA regulated only commercial telephone solicitations. 15 U.S.C. 6106(4).[1] Congress further limited the FTC to regu-

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[1] In 2001, the USA PATRIOT Act, Pub. L. No. 107-56, § 1011, 115 Stat. 396, expanded the TCFAPA's definition of telemarketing

lating only those solicitations already within its jurisdiction. See 15 U.S.C. 6105(a).

The FTC regulations implementing the TCFAPA, see 60 Fed. Reg. 43,842 (1995), prohibit various deceptive telemarketing practices, like using "[t]hreats, intimidation, or * * * profane or obscene language," or "[m]aking a false or misleading statement to induce any person to pay for goods or services." 16 C.F.R. 310.3(a)(3)(iii)(B)(4), 310.4(a)(1) (2003). In addition, the regulations establish a "company-specific do-not-call" requirement prohibiting telemarketers from soliciting "a person when that person previously has stated that he or she does not wish" to be called. 16 C.F.R. 310.4(b)(1)(ii) (2003). Consistent with the FTC's limited jurisdiction, the regulations apply only to interstate telemarketing of goods and services, and not to telemarketing by non-profit organizations, banks, or common carriers.

c. ***The 2003 FTC regulations establishing a do-not-call registry***

In 2002, after reviewing the effectiveness of its regulations implementing the TCFAPA, the FTC published a notice of proposed rulemaking to establish a national "do-not-call" registry for consumers who voluntarily wish to limit the number of telemarketing calls they receive. 67 Fed. Reg. 4516-4520. The notice elicited a remarkable outpouring of public sentiment: the FTC received over 64,000 comments from potentially affected businesses, academics, privacy advocates, and individuals—the vast majority of which supported the creation of a national do-not-call registry. 68 Fed. Reg. 4582, 4628 (2003).

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to encompass telemarketing by for-profit entities on behalf of charities.

On January 29, 2003, the FTC issued regulations creating a national do-not-call registry, which are at issue here. See 69 Fed. Reg. 16,373 (2004) (to be codified at 16 C.F.R. 310.4(b)(1)(iii)(B)) Under those regulations, telemarketers may not "[i]nitiat[e] any outbound telephone call to a person" if:

> (A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or
>
> (B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services.

69 Fed. Reg. 16,373 (2004) (to be codified at 16 C.F.R. 310.4(b)(1)(iii)).

Thus, the FTC's regulations establish a company-specific requirement for telemarketers soliciting on behalf of commercial or charitable organizations.[2] In addition, they prohibit commercial telemarketers from placing an outbound call to individuals listed on the nationwide do-not-call registry, unless the telemarketer "has obtained the express" consent of the person it is calling, or "has an established business relationship

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[2] A suit challenging the portion of 69 Fed. Reg. 16,373 (2004) (to be codified at 16 C.F.R. 310.4(b)(1)(iii)(A)) that prohibits telemarketers for charitable organizations from calling individuals who have expressed a desire not to be called is currently pending before the Fourth Circuit. See *National Fed'n of the Blind* v. *FTC*, 303 F. Supp. 2d 707 (D. Md. 2004), appeal pending, No. 04-1378.

with such person." 69 Fed. Reg. 16,373 (2004) (to be codified at 16 C.F.R. 310.4(b)(1)(iii)(B)(i) and (ii)). Finally, the regulations provide that telemarketers may gain access to the nationwide do-not-call registry for a fixed fee that is calculated based on the number of area codes the telemarketer accesses. 68 Fed. Reg. at 4628-4641.

These new regulations were, in the FTC's view, necessary in light of the company-specific requirement's shortcomings. The company-specific approach was "extremely burdensome" to consumers because it required them to "repeat their 'do-not-call' request with every telemarketer that calls." 68 Fed. Reg. at 4629. Telemarketers also ignored do-not-call requests; consumers could not verify that they had been removed from a telemarketer's list; and, consumer litigation to enforce the requirement was "complex and time-consuming." *Ibid.* Indeed, 27 States had established statewide do-not-call lists because the existing regulations had "proven ineffective." *Id.* at 4629, 4630.

The FTC explained its decision to exclude charitable solicitation calls from the do-not-call registry restrictions, but not the company-specific requirement, on the ground that the record reflected great public dissatisfaction with commercial solicitations. 68 Fed. Reg. at 4629-4631. In addition, due to "fundamental differences between commercial solicitations and charitable solicitations," the FTC concluded that "company-specific 'do-not-call' requirements [would have] a greater measure of success" with charitable organizations. *Id.* at 4637. The FTC also acknowledged that advocacy was inherent in charitable solicitations, and thus, such solicitations might be entitled to a greater degree of First Amendment protection. *Id.* at 4634-4636. Nonetheless, the FTC concluded that telemarketing on

behalf of charitable organizations should be regulated to some degree because such calls interfere with residential peace. *Id.* at 4637. Accordingly, the FTC required charitable telemarketers calls within its jurisdiction—that is, for-profit telemarketers acting on behalf of a charitable organization—to comply with the company-specific requirement. *Ibid.* It further provided that it would revisit this issue if the company-specific rule failed to protect consumer privacy in this context. *Ibid.*

d. *The 2003 Consolidated Appropriations Resolution and Do Not Call Implementation Act and the FTC's and FCC's implementing regulations*

Shortly after the FTC promulgated its do-not-call registry regulations, Congress enacted the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 96, and the Do-Not-Call Implementation Act (DNCIA), Pub. L. No. 108-10, § 2, 117 Stat. 557. The first act permits the FTC to collect up to $18.1 million in fees "to implement and enforce the do-not-call provisions of the Telemarketing Sales Rule." 117 Stat. 96. The second authorized the FTC to collect fees "sufficient to implement and enforce the provisions relating to the 'do-not-call' registry of the Telemarketing Sales Rule." § 2, 117 Stat. 557. The FTC subsequently promulgated a fee rule under which a telemarketer may access for 12 months the names of do-not-call consumers in up to five area codes for free but charges $25 per area code thereafter, with a maximum fee of $7375.[3] *Final Fee Rule*, 68 Fed. Reg. 45,141, 45,144 (2003). Entities that are not required to

[3] On April 30, 2004, the FTC published a notice of proposed rulemaking to raise this fee to $45 per area code. See 69 Fed. Reg. 23,701.

comply with, but voluntarily honor, the do-not-call regulations may access the registry free of charge. *Id.* at 45,144.

On June 27, 2003, the FTC opened the registry for consumer enrollment. Within 72 hours, consumers had registered more than 10 million telephone numbers on the registry. FTC Press Release, *Do Not Call Registrations Exceed 10 Million* (June 30, 2003) <http://www.ftc.gov/opa/2003/06/dncregistration.htm.>.

On July 3, 2003, the FCC revised its regulations pursuant to the DNCIA, and also established a national do-not-call registry. See Report and Order, 18 F.C.C.R. at 14,017 para. 1. Like the FTC, the FCC concluded that such a registry was needed due to the substantial rise in telemarketing calls and the increasing use of computerized predictive dialers. *Id.* at 14,017 para. 2. As a result of these changes, the company-specific requirement had become a burden "on the elderly and individuals with disabilities" who had to repeat their do-not-call requests to every telemarketer. *Id.* at 14,030 para. 19; *id.* at 14,054 para. 66. The FCC emphasized that the registry would include only "the telephone numbers of consumers who indicate that they wish to avoid such calls," and that "[c]onsumers who want to receive such calls may instead continue to rely on the company-specific do-not-call lists to manage telemarketing calls into their homes." *Id.* at 14,018 para. 3.

The national do-not-call registry has grown in popularity. As of June 2004, 62 million phone numbers had been entered on the registry. See FTC Press Release, *National Do Not Call Registry Celebrates One-Year Anniversary* (June 24, 2004) <http://www.ftc.gov/opa/2004/06/dncanny.htm> (June 24 Press Release).

e. *Ratification of the FTC's do-not-call rule*

On September 23, 2003, the District Court for the Western District of Oklahoma held that the FTC lacked statutory authority to establish a do-not-call registry. *U.S. Security* v. *FTC*, 282 F. Supp. 2d 1285 (W.D. Okla.). In response to that decision, Congress enacted and the President signed into law Public Law Number 108-82, which expressly recognizes the FTC's statutory authority to promulgate a do-not-call registry and "ratif[ied]" the FTC's existing do-not-call regulation.[4]

2. *Proceedings Below*

a. *The district court proceedings*

After the FTC published its do-not-call registry regulations, petitioners commenced two related actions, one challenging the FTC's regulations and the other challenging the FCC's regulations, on First Amendment (and other) grounds.

In the first action, the United States District Court for the District of Colorado enjoined implementation of the FTC's national do-not-call registry regulations on the ground that the regulations violate the First Amendment. Pet. App. 106a. The court recognized that the registry merely provides "a mechanism by which the individual can choose to ban all commercial telemarketing calls to his residence," *id.* at 95a, that the government's interest in protecting residential privacy and tranquility "is of the highest order in a free and civilized society," *id.* at 99a, and that the registry would block a "substantial amount of unwanted calls." *Id.* at

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[4] In the decision below, the court of appeals reversed the judgment in *U.S. Security*. Pet. App. 36a-37a. The plaintiffs in that case, however, have not sought this Court's review of the decision. See Pet. 9 n.2.

101a. Nonetheless, the court concluded that the registry could not satisfy the standards for regulating commercial speech established in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Specifically, the district court concluded that the FTC's regulations did not "materially advance" the government's interest in protecting residential privacy, because charitable telephonic solicitations were exempted from the regulations' scope. Pet. App. 100a-106a. Accordingly, the district court enjoined the regulations. On the FTC's motion, the Tenth Circuit entered a stay of the injunction pending appeal. *Id.* at 39a-57a.

In their second action, petitioners filed a petition for review and an application for stay of the FCC's regulations directly with the Tenth Circuit, arguing the regulations violated the First Amendment. The Tenth Circuit denied the stay application, and Justice Breyer subsequently denied an application to this Court to stay the implementation of the FCC's rules.

b. ***Proceedings before the Tenth Circuit***

The Tenth Circuit consolidated the two actions and rejected petitioners' First Amendment challenges in a unanimous decision. Pet. App. 1a-38a. The court of appeals concluded that the registry "directly advances the government's important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech" "by effectively blocking a significant number of calls that cause the problems the government sought to redress." *Id.* at 4a, 15a; see *id.* at 19a (noting that the legislative record and the telemarketers' own estimates demonstrate that a substantial

share of all solicitation calls will be covered by the do-not-call registry).

The court also concluded that the registry was narrowly tailored to advance these interests because it "prohibits only telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls." Pet. App. 22a; see *id.* at 15a (the registry's "opt-in character ensures that it does not inhibit any speech directed at the home of a willing listener"). Consumers who wish to receive telemarketing calls may refrain from entering their name on the registry, while those who wish to receive select calls may rely on the company-specific requirement or the exemption to the nationwide registry for calls made with the consumer's permission. *Id.* at 25a.

The court rejected petitioners' contention that the company-specific requirement was adequate to protect consumers, noting that the record "overwhelmingly" demonstrated the opposite. Pet. App. 25a. The court also rejected petitioners' claim that the registry was fatally underinclusive because it excluded charitable and political solicitations, holding that "the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front." *Id.* at 15a (citing *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 434 (1993)). The court of appeals distinguished this Court's decision in *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 417-418 (1993), which held that a municipality could not prohibit the placement of only commercial newsracks on public property, reasoning that the regulation at issue in that case was so underinclusive, it was irrational and failed to advance materially the asserted governmental interests. Pet. App. 15a-18a, 27a-28a. The do-not-call registry regulations, however, prohib-

ited a substantial number of unwanted solicitations and were not "ineffective." *Id.* at 18a. The court added that "Congress, the FTC and the FCC ha[d] all determined" that "commercial calls" were the "most to blame for the problems the government is seeking to redress" (*id.* at 20a), and the FTC had found "that commercial callers are more likely than non-commercial callers to engage in deceptive and abusive practices." *Ibid.*

Finally, the court of appeals disagreed with petitioners' argument that the FTC's fee rule was unconstitutional. These fees were statutorily authorized as necessary "to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales Rule, and other activities resulting from such implementation and enforcement." Pet. App. 31a (quoting Pub. L. No. 108-10, § 2, 117 Stat. 557). Such fees to defray the cost of a legitimate regulation, the court observed, had long been recognized as constitutionally valid. *Id.* at 30a-31a (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941)).

ARGUMENT

The decision below is consistent with this Court's precedents and the decisions of other courts of appeals. Further review by this Court is therefore not warranted.

I. *The Do-Not-Call-Registry Regulations Satisfy The Standards For Regulating Commercial Speech Established In* Central Hudson.

1. Review by this Court is unnecessary because the court of appeals' decision is correct. Indeed, the do-not-call registry regulations differ significantly from the kinds of laws typically at issue in First Amendment cases, because they do not establish a government-im-

posed ban on speech that some members of the public might want to hear. See Pet. 16, 21. The regulations establish a framework to enforce *consumers'* own choices about commercial speech and telephone privacy in their homes. See 69 Fed. Reg. 16,373 (2004) (to be codified at 16 C.F.R. 310.4(b)(1)(iii)). Absent consumer action—specifically, a consumer directive not to be called—commercial telemarketers are free to place honest and non-abusive solicitation calls. This Court's precedents establish, moreover, that Congress may "permit[] a citizen to erect a wall" that "no advertiser may penetrate without his acquiescence." *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 738 (1970). "[N]o one has the right to press even 'good' ideas on to an unwilling recipient." *Hill* v. *Colorado*, 530 U.S. 703, 718 (2000) (quoting *Rowan*, 397 U.S. at 738).

2. Understood in this manner, the do-not-call registry regulations easily satisfy the standard this Court established in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Under *Central Hudson*, lawful commercial speech may be regulated if "the asserted governmental interest is substantial," "the regulation directly advances the governmental interest asserted," and the regulation "is not more extensive than is necessary to serve that interest." *Id.* at 566.

The government's interest underlying the regulations, protecting home privacy and tranquility, is substantial. *Central Hudson*, 447 U.S. at 564. As this Court has recognized, "protecting the well-being, tranquility, and privacy of the home" is "of the highest order in a free and civilized society." *Frisby* v. *Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey* v. *Brown*, 447 U.S. 455, 471 (1980)).

In addition, the registry directly advances those interests. See *Central Hudson*, 447 U.S. at 564. Eighty-seven percent of those consumers registered in the do-not-call database report receiving fewer telemarketing calls, specifically an estimated decrease of 24 calls per month. June 24 Press Release, *supra*. Even under petitioners' mistakenly low estimate of the regulations' effectiveness (Pet. App. 101a), the do-not-call registry eliminates 40% to 60% of unwanted calls to registered consumers.[5] Cf. *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 434 (1993) (upholding a restriction on offending ads that applied only to a radio station that accounted for 11% of listening time in the affected area).

The regulations are also narrowly tailored. *Central Hudson*, 447 U.S. at 564. The do-not-call registry does not ban speech solely through government action but creates "an opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of consumers." Pet. App. 5a. As such, it is one of the least restrictive ways to regulate solicitations. See *Ashcroft* v. *American Civil Liberties Union*, 124 S. Ct. 2783, 2792 (2004) (observing that software filters may be less restrictive manner of regulating online pornography than direct government regulation because filters allowed choice at "end" rather than "source" of pornographic materials).

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[5] This estimate was based on testimony before the FTC by individual sellers and telemarketers, indicating they might have to lay off up to 50% of their employees if the registry went into effect. See 68 Fed. Reg. at 4631. The estimate does not reflect the impact of the FCC's rule, which fills substantial gaps in the FTC's jurisdiction by covering intrastate telemarketing as well as telemarketing by banks, common carriers, and other institutions.

3. Contrary to petitioners' claim (Pet. 2-3), the government's interests would not be effectively served in a less restrictive manner by relying solely on a company-specific requirement. Indeed, the FTC and FCC tried that approach, but it failed. As the record demonstrates, the company-specific requirement was burdensome to consumers, particularly the elderly and disabled (Pet. App. 25a (quoting 68 Fed. Reg. at 4631)); commercial solicitors ignored consumers' requests not to be called (*id.* at 26a (citing 68 Fed. Reg. at 4629)); and consumers could not verify that their numbers had been removed from a solicitor's calling list or prove that their requests had been disregarded. *Ibid.*

In any event, Congress is not consigned to responding to a serious problem in a manner that is less restrictive only at the expense of being significantly less effective. Rather, a law is narrowly-tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation," whether or not it is the "least intrusive" means of serving the government's interests. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985)).

4. In all events, this Court's review of this question is unnecessary to resolve any split of authority among the courts of appeals. There is no dispute that the courts of appeals have uniformly upheld FTC and FCC regulations empowering consumers to limit the telemarketing calls they receive. As the Tenth Circuit recognized (Pet. App. 29a n.13), every court of appeals that has considered constitutional challenges to such restrictions on commercial telemarketing has rejected the challenge. See *Missouri* v. *American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003) (upholding TCPA provisions barring unsolicited commercial fax advertis-

ing), cert. denied, 124 S. Ct. 1043 (2004); *Destination Ventures, Ltd.* v. *FCC*, 46 F.3d 54 (9th Cir. 1995) (same); *Moser* v. *FCC*, 46 F.3d 970 (9th Cir.) (upholding TCPA ban on prerecorded commercial telemarketing), cert. denied, 515 U.S. 1161 (1995).

II. *The Do-Not-Call Registry Regulations Are Not Unconstitutionally Underinclusive.*

1. Petitioners are equally incorrect in arguing that the do-not-call registry regulations are unconstitutionally underinclusive because they do not apply to charitable or political solicitations. Pet. 17-22. This argument is based on a misreading of this Court's decision in *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993).

In *Discovery Network*, the City of Cincinnati prohibited the placement of only commercial newsracks on public property to promote aesthetic considerations and public safety. 507 U.S. at 414. As a result of this regulation, 62 newsracks, of some 1500 to 2000 on public property, were cleared from public land. See *id.* at 414, 418. This Court held the Cincinnati ordinance unconstitutional. Observing that any benefit from Cincinnati's regulation would be "minute" and "paltry," *id.* at 417-418, the Court concluded that the city's stated interests in aesthetics and safety could not justify "the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, *and* have only a minimal impact on the overall number of newsracks on the city's sidewalks." *Id.* at 418. *Discovery Network* thus held that "a regulation that has only a minimal impact on the identified problem cannot be saved simply because it targets only commercial speech." Pet. App. 28a.

In sharp contrast to the ordinance at issue in *Discovery Network*, the do-not-call registry regulations eliminate the primary, indeed overwhelming, source of unwanted telephone solicitations. See Pet. App. 20a, 29a; see also, *e.g.*, H.R. Rep. No. 317, 102d Cong., 1st Sess. 16 (1991) ("[c]omplaint statistics show[ed] that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations") (citing poll conducted by National Association of Consumer Agency Administrators). While petitioners may disagree (Pet. 16) with the consumers who expressed their dissatisfaction with only commercial telemarketing to the FTC and FCC, that disagreement is not a basis for this Court's review.

2. In addition, petitioners err in suggesting (Pet. 18-22) that *Discovery Network* requires the government to treat commercial and non-commercial speech identically when responding to a problem caused primarily by commercial entities. To the contrary, this Court does not "require that the Government make progress on every front before it can make progress on any front. * * * [T]he Government may be said to advance its purpose by substantially reducing [a public harm], even where it is not wholly eradicated. *Edge Broad. Co.*, 509 U.S. at 434. Addressing problems related to commercial solicitation before charitable solicitation is rational, moreover, because "charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services." *Village of Schaumburg* v. *Citizens for a Better Env't* 444 U.S. 620, 632 (1980).

3. Petitioners' call (Pet. 17-22) for the Court to clarify *Central Hudson* in light of its decision in *Discovery Network* is inappropriate here, as this case

would be a poor vehicle to consider that issue. Some members of this Court have suggested that a stricter standard than the one announced in *Central Hudson* should apply to regulations that ban speech for "paternalistic" reasons. See *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 367-368 (2002); *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in the judgment). But the do-not-call registry regulations reflect a distinctly non-paternalistic approach to a serious problem. Indeed, far from adopting a paternalistic approach, the regulations empower consumers to decide what information they will hear. Accordingly, this case is not the appropriate vehicle for determining any limits to *Central Hudson*.

4. Contrary to petitioners' claim (Pet. 21-22), there is no conflict among the courts of appeals over the "proper application" of this Court's decision in *Discovery Network* that would nonetheless justify this Court's review. *Ibid.* In every case petitioners cite for this proposition (*ibid.*), the courts acknowledge and agree on the legal principle governing this case: the government can ban commercial speech, and not noncommercial speech, if doing so effectively serves the governmental interest. See *Rappa* v. *New Castle County*, 18 F.3d 1043, 1065 (3d Cir. 1994) ("The state can exempt from a general ban speech having [a particular] content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate and so long as * * * the exception is substantially related to advancing an important state interest."); *Pearson* v. *Edgar*, 153 F.3d 397, 403 (7th Cir. 1998) (recognizing that government could adopt limited ban on speech so long as it demonstrated a "reasonable fit"

between the ban and the government's interest); *Action for Children's Television* v. *FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (observing that "[i]n light of [their] differences, radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment"); *Outdoor Sys., Inc.* v. *City of Mesa*, 997 F.2d 604, 611 (9th Cir. 1993) (upholding municipal code provisions that distinguished between types of commercial speech on the ground that "there is a reasonable fit between the sign codes and the interests they seek to achieve"). Thus, there is no meaningful difference in the courts of appeals' application of *Discovery Network* with respect to the relevant legal principle here.

5. The different outcomes in these cases, moreover, are due to the different regulations and different evidentiary records before the courts, not differences in the application of *Discovery Network*. The statute invalidated by the Third Circuit in *Rappa*, 18 F.3d at 1047, for example, banned a challenger's political campaign signs while allowing commercial signs without justification for the difference in treatment between the signs. In *Pearson* v. *Edgar*, the Seventh Circuit invalidated a mechanism that allowed homeowners to reject real estate solicitation but not other forms of solicitation, in the absence of any evidence that "real estate solicitation harms or threatens to harm residential privacy." 153 F.3d at 404. The city codes in *Outdoor Systems, Inc.*, 997 F.2d at 611, "distinguish[ed] among types of commercial speech—onsite and offsite —but as between commercial and noncommercial speech [were] neutral." Finally, in *Action for Children's Television* v. *FCC*, *supra*, the D.C. Circuit did not consider commercial speech at all, but invalidated a

statute that carved out a limited exception to a general prohibition on the radio and television broadcast of indecent material before midnight.

Here, the record before the Tenth Circuit amply supported its conclusion that some distinction between commercial and non-commercial telemarketing was warranted. See Pet. App. 17a-21a. To the extent petitioners disagree with the Tenth Circuit's reading of the record or the weight it assigned to various findings by the FTC and FCC, petitioners seek review of only fact-bound issues that do not merit this Court's review.

III. *The FTC's Fee Rules Are Constitutionally Permissible.*

1. Petitioners' separate challenge to the FTC's fee rules does not merit this Court's review for the same reasons. The lower court's conclusion that the fee rules are constitutional is correct. Under the Do-Not-Call Implementation Act, Pub. L. No. 108-10, § 2, 117 Stat. 557, the FTC is authorized to spend fees "to implement and enforce the provisions relating to the 'do-not-call' registry." Pet. App. 31a. As the court of appeals explained, fees collected to defray the cost of legitimate regulation present no First Amendment problem. *Id.* at 30a-33a.

Petitioners assert (Pet. 29) that fee revenue may not, consistent with constitutional requirements, be used to upgrade the FTC's Consumer Sentinel System. As the FTC has explained, however, the upgrade was needed to enable it to accommodate both the enormous volume of complaints the FTC anticipated the registry would generate and the demand from state law enforcers for access to those complaints. See June 24 Press Release, *supra*; *Final Fee Rule*, 68 Fed. Reg. 45,141 (2003) (Pet. App. 143a). This use of fees is plainly consistent with

this Court's precedent. See *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).

2. In addition, petitioners have failed to identify any conflict of authority on this issue, and there is no conflict that would merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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